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HOUSE BILL NO. 518

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws
on February 9, 2010)

(Patron Prior to Substitute—Delegate Rust)

A *BILL to amend and reenact §§ 2.2-3704 and 2.2-3706 of the Code of Virginia, relating to the Freedom of Information Act; applicability; disclosure of criminal records and noncriminal incident information.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3704 and 2.2-3706 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc.

A. Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

B. A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of this chapter or to impose the time limits for response by a public body. Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

1. The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with this chapter. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

2. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.

3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days in which to provide one of the four preceding responses.

C. Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

D. Subject to the provisions of subsection G, no public body shall be required to create a new record if the record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.

E. Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter.

F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee

60 charged by a public body shall not exceed the actual cost of duplication. The public body may also
61 make a reasonable charge for the cost incurred in supplying records produced from a geographic
62 information system at the request of anyone other than the owner of the land that is the subject of the
63 request. However, such charges shall not exceed the actual cost to the public body in supplying such
64 records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating
65 topographical maps developed by the public body, for such maps or portions thereof, which encompass
66 a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be
67 estimated in advance at the request of the citizen.

68 G. Public records maintained by a public body in an electronic data processing system, computer
69 database, or any other structured collection of data shall be made available to a requester at a reasonable
70 cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases
71 are combined or contain exempt and nonexempt records, the public body may provide access to the
72 exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as
73 provided by this chapter.

74 Public bodies shall produce nonexempt records maintained in an electronic database in any tangible
75 medium identified by the requester, including, where the public body has the capability, the option of
76 posting the records on a website or delivering the records through an electronic mail address provided
77 by the requester, if that medium is used by the public body in the regular course of business. No public
78 body shall be required to produce records from an electronic database in a format not regularly used by
79 the public body. However, the public body shall make reasonable efforts to provide records in any
80 format under such terms and conditions as agreed between the requester and public body, including the
81 payment of reasonable costs. The excision of exempt fields of information from a database or the
82 conversion of data from one available format to another shall not be deemed the creation, preparation or
83 compilation of a new public record.

84 H. In any case where a public body determines in advance that charges for producing the requested
85 records are likely to exceed \$200, the public body may, before continuing to process the request, require
86 the requester to agree to payment of a deposit not to exceed the amount of the advance determination.
87 The deposit shall be credited toward the final cost of supplying the requested records. The period within
88 which the public body shall respond under this section shall be tolled for the amount of time that
89 elapses between notice of the advance determination and the response of the requester.

90 I. Before processing a request for records, a public body may require the requester to pay any
91 amounts owed to the public body for previous requests for records that remain unpaid 30 days or more
92 after billing.

93 *J. In the event a public body has transferred possession of public records to any entity, including but*
94 *not limited to any other public body, for storage, maintenance or archiving, the public body initiating*
95 *the transfer of such records shall remain the custodian of such records for purposes of responding to*
96 *requests for public records made pursuant to this chapter and shall be responsible for retrieving and*
97 *supplying such public records to the requester. In the event a public body has transferred public records*
98 *for storage, maintenance or archiving and such transferring public body is no longer in existence, any*
99 *public body that is a successor to the transferring public body shall be deemed the custodian of such*
100 *records. In the event no successor entity exists, the entity in possession of the public records shall be*
101 *deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and*
102 *supply such records to the requester.*

103 § 2.2-3706. Disclosure of criminal records; limitations.

104 A. As used in this section:

105 "Criminal incident information" means a general description of the criminal activity reported, the date
106 and general location the alleged crime was committed, the identity of the investigating officer, and a
107 general description of any injuries suffered or property damaged or stolen.

108 "Criminal investigative file" means any documents and information including complaints, court
109 orders, memoranda, notes, diagrams, maps, photographs, correspondence, reports, witness statements,
110 and evidence relating to a criminal investigation or prosecution, other than criminal incident
111 information.

112 B. Law-enforcement agencies shall make available upon request criminal incident information relating
113 to felony offenses. However, where the release of criminal incident information is likely to jeopardize an
114 ongoing investigation or prosecution, or the safety of an individual; cause a suspect to flee or evade
115 detection; or result in the destruction of evidence, such information may be withheld until the
116 above-referenced damage is no longer likely to occur from release of the information. Nothing in this
117 subsection shall be construed to prohibit the release of those portions of such information that are not
118 likely to cause the above-referenced damage.

119 C. Information in the custody of law-enforcement agencies relative to the identity of any individual,
120 other than a juvenile, who is arrested and charged, and the status of the charge or arrest shall be
121 released.

D. The identity of any victim, witness or undercover officer, or investigative techniques or procedures need not but may be disclosed unless disclosure is prohibited or restricted under § 19.2-11.2.

E. The identity of any individual providing information about a crime or criminal activity under a promise of anonymity shall not be disclosed.

F. The following records are excluded from the provisions of this chapter, but may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law:

1. ~~Complaints, memoranda, correspondence, case files or reports, witness statements, and evidence relating to a criminal investigation or prosecution, other than criminal incident information as defined in subsection A~~ Criminal investigative files as defined in subsection A;

2. Adult arrestee photographs when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of the photograph will no longer jeopardize the investigation;

3. Reports submitted in confidence to (i) state and local law-enforcement agencies, (ii) investigators authorized pursuant to § 53.1-16 or § 66-3.1, and (iii) campus police departments of public institutions of higher education established pursuant to Chapter 17 (§ 23-232 et seq.) of Title 23;

4. Portions of records of local government crime commissions that would identify individuals providing information about crimes or criminal activities under a promise of anonymity;

5. Records of local law-enforcement agencies relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such agencies under a promise of anonymity;

6. All records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment;

7. Records of law-enforcement agencies, to the extent that such records contain specific tactical plans, the disclosure of which would jeopardize the safety or security of law-enforcement personnel or the general public;

8. All records of adult persons under (i) investigation or supervision by a local pretrial services agency in accordance with Article 5 (§ 19.2-152.2 et seq.) of Chapter 9 of Title 19.2; (ii) investigation, probation supervision or monitoring by a local community-based probation services agency in accordance with Article 9 (§ 9.1-173 et seq.) of Chapter 1 of Title 9.1; or (iii) investigation or supervision by state probation and parole services in accordance with Article 2 (§ 53.1-141 et seq.) of Chapter 4 of Title 53.1; ~~and~~

9. Records of a law-enforcement agency to the extent that they disclose the telephone numbers for cellular telephones, pagers, or comparable portable communication devices provided to its personnel for use in the performance of their official duties;

10. *Those portions of any records containing information related to undercover operations or protective details that would reveal the staffing, logistics, or tactical plans of such undercover operations or protective details. Nothing in this subdivision shall operate to allow the withholding of information concerning the overall costs or expenses associated with undercover operations or protective details; and*

11. *Records of (i) background investigations of applicants for law-enforcement agency employment, (ii) administrative investigations relating to allegations of wrongdoing by employees of a law-enforcement agency, and (iii) other administrative investigations conducted by law-enforcement agencies that are made confidential by law.*

G. Records kept by law-enforcement agencies as required by § 15.2-1722 shall be subject to the provisions of this chapter except:

1. ~~Those that~~ those portions of noncriminal incident or other investigative reports or materials ~~containing that contain~~ identifying information of a personal, medical or financial nature ~~provided to a law-enforcement agency may be withheld~~ where the release of such information would jeopardize the safety or privacy of any person.

2. Those portions of any records containing information related to plans for or resources dedicated to undercover operations; or

3. Records of background investigations of applicants for law-enforcement agency employment or other confidential administrative investigations conducted pursuant to law.

H. Records of the Sex Offender and Crimes Against Minors Registry maintained by the Department of State Police pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1 are excluded from the provisions of this chapter, including information obtained from state, local and regional officials, except to the extent that information is required to be posted on the Internet pursuant to § 9.1-913.

I. In the event of conflict between this section as it relates to requests made under this section and other provisions of law, this section shall control.